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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 489

RAYMOND DOWNUM,

Petitioner,

vs.

UNITED STATES.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITIONER'S BRIEF

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Opening Statement

In *Gori v. United States*, 367 U.S. 364, decided on June 12, 1961, the five member majority of this court, in passing on the question of double jeopardy, specifically refused to anticipate a hypothetical case "in which a judge exercises his authority to help the prosecution at a trial in which its (the government's) case is going badly by affording it another, more favorable opportunity to convict the accused" (367 U.S. 369). The case there hypothesized is the actual case now presented by this record. In this case after the accused had been arraigned and pleaded not guilty, a jury was empaneled and sworn. At the request of the prosecution and over the protest of the accused through

his appointed counsel, the court discharged the jury because the prosecution had not checked his witnesses before selecting the jury and one prosecution witness was absent. At a later time and over the accused's plea of former jeopardy, there was a second trial before another jury at which time the accused was convicted.

Opinions Below

There was no opinion written by the United States District Court for the Western District of Texas, San Antonio Division, in this case. The opinion of the United States Court of Appeals for the Fifth Circuit can be found in the transcript of record beginning at page 38.

Constitutional Provision Involved

This case involves that provision of the Fifth Amendment to the Constitution of the United States of America which provides that no person shall "... be subject for the same offense to be twice put in jeopardy of life or limb ...".

Questions Presented

The Trial Court's overruling of Petitioner's plea of former jeopardy and its subsequent approval by the Court of Appeals raises the following basic question: Whether, after the United States announces ready in a criminal case and a jury is selected which is sworn in, and the prosecution then discovers it is not ready because of the absence of a witness as to two counts of a multicount indictment who had not been served with subpoena, it can obtain another jury to attempt to convict the accused.

Statement of the Case

Petitioner was indicted with other co-defendants for forgery and passing of government checks and conspiracy to forge and pass government checks. As to Raymond Downum, there were six counts of the indictment which related to him (R. 1-4).

On April 19, 1961, Petitioner was arraigned in open court together with his co-defendants, Juan R. Campos and Ronnie Heck (R. 31-38).

Downum pleaded not guilty to all counts of the indictment against him, while the co-defendants, Juan R. Campos and Ronnie Heck, pleaded guilty to all indictments against them at that time (R. 31-38).

On April 25, 1961, the Trial Court called the case of *United States of America v. Raymond Downum* for trial and both the accused and the prosecution announced ready without qualification. Whereupon, a jury was selected and the entire jury was duly sworn to render a true verdict in the case of *United States of America v. Raymond Downum*. The trial was then recessed until after lunch. Thereafter at 2:00 p.m., the jury still being in the hall, the court announced from the bench in open court, that the prosecutor had advised him in chambers that the government was not ready because of the absence of a material witness, and the court stated that he was going to discharge the jury. Defendant thereupon objected to any postponement or discharge of the jury. Upon inquiry as to who the missing witness was, the prosecutor announced that it was Clarence D. Rutledge, the named Payee on checks involved in counts Six and Seven in the indictment against the accused. The accused then moved that the trial proceed on the remaining four counts in which the missing witness was

not involved. The court overruled this motion. Thereupon the accused moved to dismiss counts Six and Seven for want of prosecution which motion was likewise overruled (R. 9-10).

The court then called the jury into the courtroom and discharged them from the case (R. 11).

The prosecutor stated that the reason that he had announced ready when actually he was not ready was that neither he nor any member of the U. S. Attorney's Staff had checked with the United States Marshal's office to ascertain whether or not all of the subpoenas in this case had been served, even though he admitted that the United States Marshal's office was directly across the hall from his office (R. 16-23).

Thereafter on April 27, 1961, the case was again called for trial and another jury from another panel, different from the first panel was selected. Prior to selecting this jury, the accused pleaded former jeopardy under the Fifth Amendment and asked the court to dismiss the charges against him (R. 11-12).

The court overruled this plea, the jury was selected, and after a trial, Petitioner was convicted on all six counts of the indictment (R. 25).

After conviction and sentence, the accused filed a motion for a new trial and again urged his plea of former jeopardy which the court overruled (R. 30). On appeal to the United States Court of Appeals for the Fifth Circuit, the conviction was affirmed (R. 44), and this Court has granted certiorari.

ARGUMENT AND AUTHORITIES

When the First Jury Selected and Sworn to Try Petitioner Was Discharged for the Sole Benefit of the Government for a Cause Which Was Not an "Unforeseeable Imperious Necessity" Petitioner Was Placed in Jeopardy and a Subsequent Trial by Another Jury Was Therefore Void.

In its opinion in this case, the Court of Appeals has amended the Fifth Amendment of the Constitution of the United States so that it no longer says that no person shall "... be subject for the same offense to be twice put in jeopardy of life or limb ...". It has changed the wording to read that no person shall be put in jeopardy a second time "except if the 'ends of public justice will be defeated' (whatever that means) as determined by the Trial Court in his discretion" (R. 40).

The Government has virtually conceded Petitioner was put in jeopardy in its reply to Petitioner's application for certiorari, but asserts that it was "jeopardy in the most technical sense of the term" (page 5, Government's Brief). However, Petitioner's position is that the Constitution does not make any distinction between jeopardy and "technical jeopardy".

If this Court affirms the conviction of Petitioner, the principle will be established that the prosecution will have a free look at the jury with the only "unforeseeable imperious necessity" required being that the Government did not check its witnesses and a witness to a few counts of a multi-count indictment is not present. By this means the Government could obtain a new jury for the entire indictment if dissatisfied with the original jury.

In *Gori*, Mr. Justice Douglas said:

"Once a jury has been empaneled and sworn, jeopardy attaches and subsequent prosecution is barred if a

mistrial is ordered—absent a showing of imperious necessity * * * . The prosecution must stand or fall on its performance at the trial. *I do not see how a mistrial directed because the prosecutor has no witnesses is different from a mistrial directed because a prosecutor misuses his office and is guilty of misconduct.*" (Emphasis added.)

It is true that the above question comes from the four member dissenting minority, but the majority in *Gori* does not question the soundness of the principles announced by Justice Douglas. The majority there went off on the grounds that the order of mistrial there was "the product of the trial judges extreme solicitude—an over-eager solicitude, it may be—in favor of the accused" and inferentially the "over-eager solicitude" of the trial judge *in favor of the accused* constituted our "imperious necessity". How different the controlling facts in *Gori* were from the facts at bar!

Justice Douglas obviously assumed that the entire court would agree that "a mistrial directed because the prosecutor has no witnesses" would make valid a plea of double jeopardy and yet this is exactly what happened in this case.

This rule of course was derived from the case of *Cornero v. United States*, 9 Cir. 1931, 48 F. 2d 69, a case virtually identical in fact to the one involved here, in which it was held jeopardy attached.

In that case, the defendants were charged in a one-count indictment with a conspiracy to possess and transport intoxicating liquors with four others. Three of the others pleaded guilty and defendant pleaded not guilty on July 12, 1927. On May 3, 1928, a jury was empaneled to try the defendant without the District Attorney having ascertained whether or not his witnesses were present. He was

relying on the testimony of two of the co-defendants who had previously pleaded guilty and who were released under bond to appear for sentence on the day of trial. They had not been subpoenaed as witnesses but it was assumed by the District Attorney that they would be present at the trial in view of the obligation under bond to do so. After the jury was empaneled, the District Attorney found that the witnesses were not present and the court continued the case from time to time until May 8, 1928, at which time the witnesses still had not been found and the court discharged the jury.

Two years later, on May 6, 1930, a second jury was selected, appellant's plea of former jeopardy was overruled and Cornero was convicted and sentenced to two years and a fine of \$7500.00. The Ninth Circuit held that the defendant's plea of former jeopardy should have been sustained; the judgment was reversed with instructions to the Trial Court to discharge the defendant. The Court said:

"The fact is that, when the district attorney empaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance. While their absence might have justified a continuance of the case in view of the fact that they were under bond to appear at that time and place, the question presented here is entirely different from that involved in the exercise of the sound discretion of the trial court in granting a continuance in furtherance of justice. The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy. *There is no difference in principle between a discovery by the district attorney immediately after the jury was empaneled that his evidence was insufficient and a*

discovery after he had called some or all of his witnesses. It is uniformly held that, in the absence of sufficient evidence to convict, the district attorney cannot by any act of his deprive the defendant of the benefit of the constitutional provision prohibiting a person from being twice put in jeopardy for the same offense." (Emphasis added.)

The Court of Appeals in this case attempted to distinguish the *Cornero* case on the thin thread that in that case no subpoena had been issued for the witnesses, while in this case, the subpoena had been issued but not served "for reasons which the court thought justifiable". The Court of Appeals completely missed the point in regard to this. The complaint is not because a subpoena had not been served, but because the prosecutor and his staff did not make a simple cursory check, before selecting the jury, to find out whether all of the subpoenas had been served. As it says in *Cornero*, when the district attorney empaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance.

If the reason why the subpoena had not been served was valid, the prosecution, had he checked, could have called the court's attention to this fact before selecting the jury and a continuance could have been obtained.

Even though the prosecutor found out after the jury was selected that his witness was not present, he could have asked for a short continuance of a few days and when the witness was found two days later, could have tried Petitioner using the first jury selected. But the prosecutor asked for a mistrial and a second jury to try Petitioner and the court granted the prosecutor's request in spite of Petitioner's protest.

A second reason which the Court of Appeals gave in trying to distinguish *Cornero* was that the delay in *Cornero* was two years and here it was merely two days. This points up even more realistically the danger that is present if the principle announced by the opinion of the Court of Appeals is established. The prosecution could have a witness upon whom a subpoena was not served but who was available for subpoena. The prosecution could then announce ready and proceed to select a jury, but if the jury looked to the prosecution to be favorable to the accused, the prosecution could then ask for a mistrial on the grounds of a missing witness. They could then come in just a short time after and obtain another jury more likely to convict.

The Government in its reply to the petition for certiorari attempted to distinguish on the basis that the second trial two years later was properly found to be harassment of the defendant, and that since there was only two days delay in this case, the defendant was not harassed. Harassment is not the test of jeopardy and the Government made no other attempt to distinguish the *Cornero* case; it simply dismissed it by referring to *Wade v. Hunter*, 336 U.S. 684, saying that the *Cornero* case cannot apply a rigid rule. We agree that *Cornero* cannot be used as a rigid rule, but the circumstances in this case were virtually identical with *Cornero* and nowhere near the circumstances of *Wade v. Hunter*, where the movements of the Army in the field compelled the discontinuance of trial, something that was an unforeseeable event.

Two other older Federal cases, although not cited in *Cornero*, supported its decision and held that once a jury is empaneled and sworn, jeopardy attaches.

The first is *United States v. Shoemaker*, 27 Fed. Cases 1067 (No. 16279). In this case the jury was empaneled and witnesses were sworn and then the prosecutor abandoned

the prosecution and entered a *nolle prosequi* on the indictment. The court in holding that this placed the defendant in jeopardy said,

"However guilty he may be, he can be convicted only according to law. And a jury having been sworn to try his case he has a right to their verdict unless some inevitable occurrence shall interpose and prevent the rendition of a verdict. Before he goes to trial, the prosecutor should see that his witnesses are in attendance and that he is prepared to try any issue."

The Court cited from *Com. v. Cook*, 6 Serg. & R. 577 where the court decided that the discharge of a jury once sworn in a criminal case was an acquittal of the defendant.

The second case is *United States v. Watson*, 28 Fed. Cases 499 (No. 16651) where the court held that a discharge of a jury because of the illness of the district attorney and the absences of witnesses for the United States placed the defendant in jeopardy. The court said,

"The mere illness of the district attorney, or the mere absence of witnesses for the prosecution under the circumstances disclosed by the record in this case is not ground upon which in the exercise of a sound discretion, a court can, on the trial of an indictment, properly discharge a jury, without the consent of the defendant, after the jury has been sworn and the trial thus commenced."

The Court of Appeals based its opinion almost entirely on the case of *United States v. Perez*, 22 U.S. (9 Wheat.) 579, and stated that *Perez* holds that a judge may discharge a jury within sound discretion without operating as an acquittal when the ends of public justice require it.

Petitioner says that this is a misstatement of the principle announced in *Perez*. *Perez* stated in all cases of *that nature* (a hung jury) jeopardy did not attach when there was a manifest necessity for the mistrial or the ends of public justice would be defeated, but *Perez* did not hold that jeopardy does not apply in cases which are *not of that nature* where the ends of public justice would be defeated. Possibly, many times the ends of public justice may require that an individual be tried three or four times until he is convicted, but the constitutional guarantee against being twice placed in jeopardy prohibits this.

The Court of Appeals says there must be a sound reason for the mistrial if it is not to result in jeopardy and points out the "real and substantial" reason here was that a vital (Government) witness would not be available for the trial.

Yet in the same paragraph of the Opinion, the Court contradicts itself and says, "Of course, conduct of the prosecutor may be of great importance where circumstances indicate that events of this kind are being advanced and exploited as pretext to squeeze out of a trial then going badly for the Government in the hopes that the deficiencies can be overcome in a later trial".

Was not the mistrial requested by the prosecutor and granted by the court so the Government could get out of a trial for which they were not ready for in the hopes that the deficiency could be overcome in a later trial?

The Court of Appeals naively says that there was no evidence or indication that Petitioner was deprived of any right or prejudiced in any way because of the action of the Court in discharging the first jury, citing *Lovato v. New Mexico*, 242 U.S. 199, where a simple irregularity occurred and after a jury was sworn, defendant was arraigned and pleaded not guilty, and the identical jury was again em-

paneled. They also cite *Collins v. Loisel*, 262 U.S. 426, where it was held that an extradition hearing was not a trial calling for the attachment of jeopardy. The Court also quotes from that case which quotes from *Bassing v. Cady*, 208 U.S. 386, where it was held that arraignment and pleading without the selection of a jury was not jeopardy.

These cases give no indication and are certainly not authority for the contention that Petitioner's right given to him by the Constitution that he shall not be placed in jeopardy more than one time was not violated in this case.

The Court of Appeals opined "The circumstances do not here tip the scales in favor of the accused". Apparently this is in response to the Government's contention that Petitioner has never claimed that the first jury was any more, or less, favorable than the second jury. This is something the Petitioner could not prove if he had to, and if an accused, who was subjected to a second trial after a mistrial was declared in his first trial, had to prove that the first jury was more favorable than the second jury, then jeopardy would become a dead letter in the law. The scales definitely were tipped against the accused and the prosecutor was given a second more favorable opportunity before another jury to attempt to convict the accused. The Court of Appeals indicates by citing a New York District Court case in footnote 4 that the defendant is not placed in jeopardy until some evidence is put on. However, Mr. Justice Douglas in *Gori* says unequivocally, "Once a jury has been empaneled and sworn, jeopardy attaches and a subsequent prosecution is barred if a mistrial is ordered—absent a showing of imperious necessity".

The Court quotes from *Sanford v. Robbins*, 5 Cir., 1940, 115 F. 2d 435, 438, a case similar to *Gori* where a new trial was given by the President of the United States in the sole

interest of the accused. They cite the court's language which says, "Various interpretations have been put on the word jeopardy, some courts thinking that jeopardy is complete on the swearing of a jury or on the submission of evidence. *This is no doubt correct if the trial be stopped for insufficient cause*".

What is insufficient cause? If this case is not an example of insufficient cause, then there is no such thing in the law.

The Government cited other cases in its reply to the petition for certiorari where jeopardy did not attach when a mistrial was declared. However, in three of them the mistrial was for the protection of the defendant and not for the benefit of the Government (*Simmons v. United States*, 142 U.S. 148; *Scott v. United States*, 202 Fed. 2d 354, certiorari denied 344 U.S. 879; *United States v. Giles*, 19 F. Supp. 1009 [W.D. Okla.]), and in two of them the mistrial was declared because of a hung jury (*Dreyer v. Illinois*, 27 U.S. 71; *Logan v. United States*, 144 U.S. 263). In *Brock v. North Carolina*, 344 U.S. 424, a discharge of a jury occurred because certain prosecution witnesses took the Fifth Amendment and a mistrial was declared. A seven to two decision upheld the second trial but based it on the fact that the Fourteenth Amendment and not the Fifth Amendment was involved, and Mr. Justice Frankfurter in his concurring opinion clearly indicated that if the Fifth Amendment had applied, the case would have been reversed.

All of the cases where jeopardy has not attached, which this court discussed in *Gori*, turned on an affirmative finding on the question as whether there was a "imperious necessity", "unforeseen circumstances", or the mistrial had been granted in the sole interest of the defendant as in *Gori*. The decision of the Court of Appeals herein is the only case in the books where, for no other cause than for

the sole benefit of the prosecutor, one jury has been empaneled and then discharged and the defendant has then been tried by a second jury.

There was nothing in this case that could not have been foreseen had the prosecutor used the slightest diligence. The question was not, as the Court of Appeals terms it, as to whether the prosecutor should have or should not have subpoenaed the witness earlier and whether or not his failure to do so was justifiable or excusable. *The question is as to whether the prosecutor should have checked to see whether the subpoena was served before he announced ready and picked the jury.* The Court, when he found out the witness was not going to be present, could have postponed the trial as was done in *Cornero* but instead, at the request of the prosecutor and on the protest of the defendant, the Court discharged the jury.

The Court of Appeals closed its opinion stating "in the light of these principles, the District Court did not abuse its sound discretion in discharging the first jury", citing *United States v. Potash*, 118 F. 2d 54, by the Second Circuit, where a mistrial was declared after the jury had begun deliberating and one of the jurors became incapacitated and did not return to finish deliberation. That has absolutely no relation to this case because that was clearly an unforeseen circumstance, which neither side could have anticipated just as a hung jury was an unforeseen circumstance in the case of *United States v. Perez*, *supra*, and just as was the tactical situation of the Army in the field in *Wade v. Hunter*, 336 U.S. 684.

Conclusion

The opinion of the Court of Appeals in this case decides the hypothetical situation posed in this court's opinion in *Gori v. United States* in a manner indicating a complete disregard of the court's language and is directly contrary to the opinion of the Ninth Circuit in *Cornero v. United States*. To fail to reverse this case will simply be a license to all Government prosecutors in important cases to have certain witnesses, or one witness, not served with subpoena and then, if the jury is unsatisfactory, to simply ask for another jury. It places within the Trial Court's "discretion" the constitutional prohibition "against being twice put in jeopardy", *United States v. Ball*, 163 U.S. 662. The Fifth Amendment was designed to protect defendants against this type of situation and this Court should reverse and render this case, and direct that the Petitioner be discharged.

November 20, 1962.

Respectfully submitted,

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